

Proposed technical amendment:

SECTION ____.(a) G.S. 41-15(a) reads as rewritten:

Note: the entire section is included for context, but only subsection (a) would appear in a bill.

[§ 41-15. Statutory rule against perpetuities.]

→ "(a) ~~Except as otherwise provided in G.S. 41-23, a~~ A nonvested property interest is invalid unless:

- (1) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
- (2) The interest either vests or terminates within 90 years after its creation."

[(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

- (1) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
- (2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.

(c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:

- (1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
- (2) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.

(d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.

(e) If, in measuring a period from the creation of a property arrangement, language in a governing instrument:

- (1) Seeks to disallow the vesting or termination of any interest beyond,
- (2) Seeks to postpone the vesting or termination of any interest until, or
- (3) Seeks to operate in effect in any similar fashion upon,

the later of (i) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the property arrangement or (ii) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives. (1995, c. 190, s. 1; 2007-390, s. 2.)]

SECTION ____.(b) G.S. 41-18 reads as rewritten:

"§ 41-18. Exclusions from statutory rule against perpetuities.

→ G.S. 41-15 does not apply ~~to~~ any of the following:

- (1) A nonvested property interest or a power of appointment arising out of a nondonative transfer, except a nonvested property interest or a power of appointment arising out of:
 - a. A premarital or postmarital agreement;

- b. A separation or divorce settlement;
 - c. A spouse's election;
 - d. A similar arrangement arising out of a prospective, existing, or previous marital relationship between the parties;
 - e. A contract to make or not to revoke a will or trust;
 - f. A contract to exercise or not to exercise a power of appointment;
 - g. A transfer in satisfaction of a duty of support; or
 - h. A reciprocal ~~transfer~~; transfer.
- (2) A fiduciary's power relating to the administration or management of assets, including the power of a fiduciary to sell, lease, or mortgage property, and the power of a fiduciary to determine principal and ~~income~~; income.
 - (3) A power to appoint a ~~fiduciary~~; fiduciary.
 - (4) A discretionary power of a trustee to distribute principal before termination of a trust to a beneficiary having an indefeasibly vested interest in the income and ~~principal~~; principal.
 - (5) A nonvested property interest held by a charity, government, or governmental agency or subdivision, if the nonvested property interest is preceded by an interest held by another charity, government, or governmental agency or ~~subdivision~~; subdivision.
 - (6) A nonvested property interest in or a power of appointment with respect to a trust or other property arrangement forming part of a pension, profit-sharing, stock bonus, health, disability, death benefit, income deferral, or other current or deferred benefit plan for one or more employees, independent contractors, or their beneficiaries or spouses, to which contributions are made for the purpose of distributing to or for the benefit of the participants or their beneficiaries or spouses the property, income, or principal in the trust or other property arrangement, except a nonvested property interest or a power of appointment that is created by an election of a participant or a beneficiary or ~~spouse~~; spouse.
 - (7) A property interest, power of appointment, or arrangement that was not subject to the common-law rule against perpetuities or is excluded by another statute of this ~~State~~; State.
 - (8) A property interest or arrangement subjected to a time limit under Article 14 of Chapter 36A, "Honorary Trusts; Trusts for Pets; Trusts for Cemetery ~~Lots~~"; or Lots."
 - (9) A property interest or arrangement subjected to a time limit under Article 3 of this Chapter, "Time Limits on Options in Gross and Certain Other Interests in ~~Land~~"; Land."
 - (10) A nonvested property interest in or a power of appointment over property or property interests of a trust to which G.S. 41-23 applies."
- (1995, c. 190, ss. 1-3.)

SECTION ____.(c) This section is effective when it becomes law and applies to all trusts created before, on, or after August 19, 2007.

Explanation: The proposed amendment to G.S. 41-15 and the proposed addition of a new subdivision (10) to G.S. 41-18 are requests from the North Carolina Bar Association's

Estate and Fiduciary Law Section as clarifying and conforming amendments. In its memorandum on the request, the Section said,

[The] revisions are intended to clarify that the Statutory Rule Against Perpetuities set forth in N.C.G.S. § 41-15 does not apply to nonvested property interests in or powers of appointment over property or property interests of a trust to which N.C.G.S. § 41-23 applies. The proposed technical revisions replace the exception for trusts governed by N.C.G.S. § 41-23 from N.C.G.S. § 41-15(a) with an express exclusion from USRAP under N.C.G.S. § 41-18 for property in or powers of appointment over trusts governed by N.C.G.S. § 41-23. It is proposed that these technical revisions become effective upon enactment and apply to all trusts created before, on, or after August 19, 2007, the date of enactment of N.C.G.S. § 41-23.

The sections proposed to be amended are in North Carolina's version of the Uniform Statutory Rule Against Perpetuities Act (USRAP) (Article 2 of Chapter 41 of the General Statutes), which was a 1995 recommendation of the General Statutes Commission. As enacted, the Act applied to trusts. In 2007, the Section proposed repealing the Act and replacing it with a provision tailored to trusts. If I remember correctly, the Commission's Trusts Drafting Committee pointed out that the Act applied to other things as well, and, as a result, the Section had its bill amended to exclude trusts from USRAP and to enact G.S. 41-23 to apply to trusts (3rd ed., enacted as S.L. 2007-390).

In the intervening years, as I understand it, questions have arisen regarding the applicability of the Act to, e.g., powers of appointment within trusts, hence the need for clarification.

The additional amendments shown in G.S. 41-18 update the punctuation style of the list in that section.

Background:

Here is the text of 2007-390:

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 2007

SESSION LAW 2007-390

HOUSE BILL 1384

AN ACT TO REPEAL THE STATUTORY RULE AGAINST PERPETUITIES AS IT APPLIES TO TRUSTS CREATED OR ADMINISTERED IN THIS STATE AND CODIFY THE LAW REGARDING THE POWER OF ALIENATION FOR TRUSTS CREATED IN NORTH CAROLINA.

The General Assembly of North Carolina enacts:

SECTION 1. Chapter 41 of the General Statutes is amended by adding a new section to read:

"§ 41-23. Perpetuities and suspension of power of alienation for trusts.

(a) A trust is void if it suspends the power of alienation of trust property, as that term is defined in G.S. 36C-1-103, for longer than the permissible period. The permissible period is no later than 21 years after the death of an individual then alive or lives then in being plus a period of 21 years.

(b) If the settlor of a revocable trust, as those terms are defined in G.S. 36C-1-103, has an unlimited power to revoke or amend the trust, the permissible period under subsection (a) of this section is computed from the termination of that power.

(c) If a trust is created by exercise of a power of appointment, the permissible period under subsection (a) of this section is computed from the time the power is exercised if the power is a general power even if the power is only exercisable as a testamentary power. In the case of other powers, the permissible period is computed from the time the power is created, but facts at the time the power is exercised shall be considered in determining whether the power of alienation is suspended beyond a life or lives in being at the time of the creation of the power plus 21 years.

(d) The power of alienation is suspended only when there are no persons in being who, alone or in combination with others, can convey an absolute fee in possession of land, or full ownership of personal property.

(e) Notwithstanding subsection (a) of this section, there is no suspension of the power of alienability by a trust or by equitable interests under a trust if the trustee has the power to sell, either expressed or implied, or if there exists an unlimited power to terminate the trust in one or more persons in being.

(f) This section does not apply to a transfer in trust (i) for charitable purposes, as defined in G.S. 36C-4-405; (ii) to a literary or charitable organization; (iii) to a veterans' memorial organization; (iv) to a cemetery corporation, society, or association; or (v) as part of a pension, retirement, insurance, savings, stock bonus, profit sharing, death, disability, or similar plan established by an employer for the benefit of some or all of its employees for the purpose of accumulating and distributing to such employees the earnings or the principal, or both earnings and principal, of the trust.

(g) This section does not apply to a future interest other than a future interest in trust and, other than as set forth in this section, this section does not modify the common law of the State regarding the power of alienation in this State.

(h) The provisions of G.S. 41-15 and the common law rule against perpetuities do not apply to trusts created or administered in this State."

SECTION 2. G.S. 41-15 reads as rewritten:

"§ 41-15. Statutory rule against perpetuities.

(a) A Except as otherwise provided in G.S. 41-23, a nonvested property interest is invalid unless:

- (1) When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or
- (2) The interest either vests or terminates within 90 years after its creation.

(b) A general power of appointment not presently exercisable because of a condition precedent is invalid unless:

- (1) When the power is created, the condition precedent is certain to be satisfied or become impossible to satisfy no later than 21 years after the death of an individual then alive; or
 - (2) The condition precedent either is satisfied or becomes impossible to satisfy within 90 years after its creation.
- (c) A nongeneral power of appointment or a general testamentary power of appointment is invalid unless:
- (1) When the power is created, it is certain to be irrevocably exercised or otherwise to terminate no later than 21 years after the death of an individual then alive; or
 - (2) The power is irrevocably exercised or otherwise terminates within 90 years after its creation.
- (d) In determining whether a nonvested property interest or a power of appointment is valid under subdivision (a)(1), (b)(1), or (c)(1) of this section, the possibility that a child will be born to an individual after the individual's death is disregarded.
- (e) If, in measuring a period from the creation of a ~~trust or other~~ property arrangement, language in a governing instrument:
- (1) Seeks to disallow the vesting or termination of any interest ~~or trust~~ beyond,
 - (2) Seeks to postpone the vesting or termination of any interest ~~or trust~~ until, or
 - (3) Seeks to operate in effect in any similar fashion upon,
- the later of (i) the expiration of a period of time not exceeding 21 years after the death of the survivor of specified lives in being at the creation of the ~~trust or other~~ property arrangement or (ii) the expiration of a period of time that exceeds or might exceed 21 years after the death of the survivor of lives in being at the creation of the ~~trust or other~~ property arrangement, that language is inoperative to the extent it produces a period of time that exceeds 21 years after the death of the survivor of the specified lives."

SECTION 3. This act is effective when it becomes law and applies to all trusts created before, on, or after that date.

In the General Assembly read three times and ratified this the 1st day of August, 2007.

s/ Beverly E. Perdue
President of the Senate

s/ Joe Hackney
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 7:31 p.m. this 19th day of August, 2007

NB: G.S. 41-23 has been since amended in subsection (h) to add that common law rule against accumulations also does not apply.